THE POWER OF CONGRESS OVER COMBINATIONS AFFECTING INTERSTATE COMMERCE.

THE question of the relative rights of the legislatures of the several states and the Congress of the United States in the regulation of contracts, combinations, conspiracies, and monopolies in restraint of trade and commerce, popularly termed trusts, has recently been brought prominently to the public notice. It has been affirmed that an amendment to the Constitution of the United States is necessary in order to vest in Congress the requisite power to enable it to deal with the subject. Among others, the President has been quoted as suggesting that such an amendment might prove to be necessary. It is the purpose here to demonstrate that there is already existing in Congress a large and extensive power, which it is believed is sufficient without the amendment proposed, and, further, to define the extent of that power. In order that this object may be attained it is first necessary to outline the state of the law and the course of the decisions of the courts as they stood before the enactment of statutes by Congress and by the legislatures of the several states concerning the subject; then to discuss the existing statutes, particularly the so-called Sherman Anti-Trust Act and its construction by the courts, and finally to point out what may yet be accomplished by Congress in regulating industrial combinations by the exercise of its existing constitutional power.

It was held at common law that those combinations and contracts which were in unreasonable restraint of trade were void. The courts refused to enforce such contracts. No penalty, however, was imposed upon the parties. All contracts and combinations in restraint of trade were not invalid. The Supreme Court of the United States, in delivering its opinion in the case of the United States *v.* The Trans-Missouri Freight Association,[1] said, speaking through Mr. Justice Peckham:

> "A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere."

[1] 166 U. S. 290.

Public policy was not deemed invaded by contracts, although in restraint of trade, which were limited in their operation with reference to time or space or persons.[1] No hard and fast rule can be laid down in order to determine what contracts in restraint of trade would have been held to be unreasonable and therefore void. The question was in each instance one for the court having the contract before it, and was considered by it with reference to all the circumstances of the case.

At common law, although a contract might be held to be in unreasonable restraint of trade and although its result might be to effectually prevent and stifle competition, yet no penalty was imposed upon the parties to the contract, and no action lay against them by one who was by reason of the contract prevented from successfully competing with the combination formed by the contract. In Mogul Steamship Co. *v.* McGregor[2] Mr. Justice Bowen said:

> "Lastly, we are asked to hold the defendant's conference or association illegal, as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines after they have been made to recognize their validity. . . . The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation . . . gives rise to no cause of action at common law."

Furthermore, a contract in restraint of trade, which would be valid at common law because limited in time or space or persons, might result in the establishment of a virtual monopoly and one which might now well be considered as seriously inimical to the public interest and welfare.[3]

The increase manifested for the past twenty years in the formation of large enterprises in this country and in the consolidation and combination of interests is clear. These combinations have taken two main forms: First, those whose professed object is the maintenance of reasonable rates among the individuals or corporations who are parties to the agreement and the suppression of

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[1] Dendy *v.* Henderson, L. R. 11 Ex. 19; Leather Cloth Co. *v.* Lorsant, L. R. 9 Ex. 345.

[2] 21 Q. B. D. 544.

[3] See Diamond Match Co. *v.* Roeber, 106 N. Y. 473.

what had proved to be ruinous competition among them; and, second, those whose object is, by means of the establishment of a virtual monopoly, to raise and maintain prices. It is believed that many of these combinations result in benefit and not in harm to the public at large, and it is therefore at their regulation and not at their complete annihilation that legislation should be directed.

The tendency of the decisions in determining whether a given contract in restraint of trade was an unreasonable one, instead of being towards broadening the rule so as to result in a more effectual regulation of combinations, was towards making the rule more narrow. In Matthew *v.* Associated Press[1] the court said:

> "The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts . . . now hold many contracts not open to the objection that they are in restraint of trade, which a few years back would have been avoided on that sole ground, both here and in England."

In order to remedy the defects in the common law as applied to our modern industrial "trusts," so-called anti-trust statutes have been enacted by the legislatures of many states of the Union. The legislature of a given state being, however, necessarily prevented by its inherent nature from enacting laws which have an extra-territorial operation, the state anti-trust statutes have been found to be inadequate to deal with, prevent, and regulate the evils arising and growing out of many of these combinations.

The question therefore naturally arises as to the power of the Congress of the United States, by constitutional legislation, to satisfactorily legislate so as to regulate the varied and complex combinations of capital existing at this time. It is provided by article I, section 8, clause 3, of the Constitution of the United States that "the Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The government of the United States is one of powers delegated to it by the states of the Union and enumerated in the Constitution. It is expressly provided by the Tenth Amendment to the Constitution of the United States that "the powers not delegated to the United States by the Constitution, nor prohibited by

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[1] 136 N. Y. 333.

it to the states, are reserved to the states respectively or to the people." This reservation of power in the several states is not, however, intended to abridge or cripple in any manner the authority of the general government in carrying into effect the powers conferred upon it. By article 1, section 8, clause 18, of the Constitution, it is provided that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States." This clause was inserted in the Constitution not because Congress would not have possessed such authority in its absence, but merely to remove from any possible doubt any question that such power existed. The powers conferred by the Constitution are sovereign in their nature, granted to create a sovereignty with governmental powers. With such a sovereignty in mind, it was not the intention of the framers of the Constitution to confer powers which should be subject to strict construction and narrow limitations. Each of the powers conferred was to be complete in itself. Congress was not to be hampered by inability to legislate upon subjects which, if not regulated, might interfere with the full efficacy of other legislation by it. Congress is not limited to the enactment of laws which are an exercise of the express powers conferred upon it. It also has power to pass laws which are reasonably necessary to carry into effect its express powers.

In pursuance of the authority conferred by the commerce clause of the Constitution, Congress, on July 2, 1890, enacted the law entitled "An act to protect trade and commerce against unlawful restraints and monopolies."[1] This act is commonly called the Sherman Anti-Trust Act. In order to determine whether the power of Congress under the commerce clause has been ex-

[1] 26 Statutes at Large 209. Section 1 declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 2 declares that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . ."

hausted by the enactment of this statute, it is first necessary to discuss and state the scope and operation of the Act, as declared by the Supreme Court.

In two important respects the common law was altered by this statute. In the first place, every contract, combination in the form of trust or otherwise, or conspiracy, in direct restraint of trade or commerce, among the several states, whether reasonable or unreasonable, is declared void; and, secondly, not only is such a contract unenforceable upon a suit instituted by one of the parties to the contract, but a penalty is imposed upon the parties. In United States *v.* Trans-Missouri Freight Association,[1] the combination assailed was an agreement among several interstate railways. By the agreement a method was provided of fixing rates on competitive interstate freight traffic south and west of the Missouri River. The agreement declared that the Association was formed "for the purpose of mutual protection by establishing and maintaining reasonable rates. . . ." The court said,[2] speaking by Mr. Justice Peckham:

"The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do."

In United States *v.* Joint Traffic Association[3] the court held that there was no substantial difference between the combination there under consideration and the Trans-Missouri agreement, and that Congress had power to say that no contract or combination shall be legal which restrains interstate trade or commerce by shutting out the operation of the general law of competition.

The Attorney-General of the United States, Mr. Knox, has

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[1] 166 U. S. 290 (1897). [2] P. 340. [3] 171 U. S. 505.

recently very ably and forcibly expressed his disapproval of the Sherman Anti-Trust Act, as construed by the Supreme Court, in that combinations in restraint of trade, even though they be reasonable, fall within its condemnation. In an address delivered by Mr. Knox at Pittsburg, Pennsylvania, in referring to the distinction between contracts in reasonable and those in unreasonable restraint of trade, it is suggested that

"in extending the law it might be deemed wise by Congress now to import and impose this distinction clearly, for the following reasons, among others: Because the hard and fast extreme rule may work injustice in various instances where a moderate restraint is either not harmful at all to the general interests or only slightly so in comparison with the importance of the freedom and sacredness of many contracts which public policy does not manifestly condemn; because the question of reasonableness, as in the common law, should be for the courts — surely the safest arbiter and reliance in human disputes — and because, from the economic standpoint, freer play would thus be given, and perhaps 'a way out' indicated, in the conflict between the important principles of free competition and combination."

A question, and a very broad and troublesome one, here arises: whether it would be wise, as suggested, to eliminate from the operation of anti-trust statutes all contracts which would have been held reasonable at common law; for many contracts which were reasonable at common law, merely because in some slight degree limited in time or space, and which would for that reason have been held valid, might still result in restraints, monopolies, and conspiracies fully as harmful as other combinations which would, because of not being so limited, have been held void. This, however, is a question of expediency.

From the above decisions it will be seen that, as applied to a contract in direct restraint of trade among the states, the provisions of the Sherman Anti-Trust Act are extremely drastic in their nature, inasmuch as such contracts are void whether reasonable or unreasonable. Yet the Act is greatly limited in its operation, since, in order that a given contract shall fall within its condemnation, the contract must be determined to be in direct restraint of trade or commerce among the states.

The most recent decision under the Sherman Anti-Trust Act is that recently handed down by the United States Circuit Court of Appeals in the case of the United States *v.* The Northern Securities Co. *et al.* In that case suit was instituted by the Government under the Sherman Anti-Trust Act for the purpose of

dissolving the merger, resulting from the creation of the Northern Securities Company, which had been organized to hold the stock of two competing trans-continental railways and to issue its own stock in lieu thereof. The court, speaking through Mr. Justice Thayer, held that the Northern Securities Company was, within the provisions of the Anti-Trust Act, a combination in restraint of trade and commerce among the several states. The validity of this decision may well be doubted. The Sherman Anti-Trust Act was aimed at contracts, combinations, and conspiracies in restraint of trade or commerce among the several states. The obvious distinction between the Trans-Missouri Freight and the Joint Traffic Association agreements and the Northern Securities merger is that the combinations in the two former cases had as their express object the maintenance of agreed rates. The direct result contemplated was a restraint of trade, and each of those agreements showed on its face that it was entered into for that purpose. Something more was accomplished by them than the vesting of power, in the parties to the agreements, to create such a restraint. By the terms of the very instruments creating these combinations, a course was agreed upon which, if followed, would inevitably accomplish that result. The statute was aimed at a combination which is, and not at one which may become, one in restraint of trade. In the Northern Securities case, a combination was created, but nothing further. Its necessary result was not a restraint of trade, although that would be its almost inevitable effect. It is almost indisputable that the railway companies in the Northern Securities Case would have been operated by one body of men so as to stifle competition between the companies. Such a result, however, could not certainly be foretold. It is perfectly possible that the Securities Company might have elected different sets of directors and the roads might have been operated as if the stockholders were distinct. In short, the combination declared to be within the statute, aside from the fact that it was "a combination," seems no more contrary to the provisions of the law than would be the acquisition by the same men of the stock of the two roads. The practical result in the two cases would be exactly the same. In other words, no object was expressed upon which could be predicated an intention of so dealing as to render the combination a restraint of trade, and the necessary effect of the merger was not to bring about that result. A restraint of trade would be, as the Supreme Court said

in the case of United States *v.* E. C. Knight Co.,[1] an indirect result, however inevitable and whatever its extent might be, and that result would not necessarily determine the object of the combination.

In any event, it has been conclusively determined by the Supreme Court of the United States that the Sherman Anti-Trust Act relates only to those contracts, combinations, and conspiracies whose direct and not whose indirect result is to restrain trade or commerce among the several states.

In the case of the United States *v.* E. C. Knight Co., the United States exhibited a bill in equity for the purpose of enjoining the so-called "Sugar Trust." The bill was dismissed by the Circuit Court of the United States, and the decision of that court was eventually affirmed by the Supreme Court. It appeared that the American Sugar Refining Company had acquired almost absolute control of the sugar-refining industry of the United States and of the manufacture of refined sugar. It was contended by the Government that the object of the combination was the establishment of a virtual monopoly in a necessary of life, and that its effect was to restrain and monopolize interstate and foreign commerce. The court, however, held that manufacture was not a part of commerce, and that, although a monopoly in manufacture be created and although a monopoly in sale might follow, yet that its effect upon interstate commerce was indirect and incidental and that it was not within the Sherman Anti-Trust Act. The court said, speaking through Mr. Justice Fuller:

> "Doubtless, the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it. . . . Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy."

In this case nothing more was decided than that a monopoly of manufacture was not within the statute and, therefore, was not void.

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[1] 156 U. S. 1.

In Hopkins *v.* United States[1] a bill in equity was filed by the United States against the defendant, Hopkins, and the other members of the Kansas City Live Stock Exchange, asking a decree that the Exchange be dissolved on the ground that it was a combination in restraint of commerce among the several states. The Exchange was an association doing business at the Stock Yards in Kansas City, a part of which were in Missouri and a part in Kansas. The business of the members was to receive live stock shipped from other states, care for and sell the same and account to the owners for the proceeds, after deducting charges and expenses. Members were prohibited from buying live stock from commission merchants in Kansas City who were not members of the Exchange. By the rules, a commission was fixed, the employment of agents to solicit consignments was prohibited except upon a stipulated salary, and the sending of prepaid telegrams or telephone messages with information as to the condition of the markets was forbidden. The Supreme Court held that the business conducted by the members of the Exchange was not interstate, but was local in character, and that the association was not a combination in restraint of commerce among the several states. The court said, at page 592: "The contract condemned by the statute is one whose direct and immediate effect is restraint upon that kind of trade or commerce which is interstate." In Anderson *v.* United States[2] a similar association was assailed, but the Supreme Court held, in accordance with the opinion in the Hopkins case, that the effect of the combination was not a direct restraint upon commerce among the states and, therefore, that it did not fall within the Sherman Anti-Trust Act. In none of these cases was the court called upon to define, and it did not declare, the limits of the power of Congress to legislate under the commerce clause of the Federal Constitution. It was merely determined by the court, that, in order that a particular contract should fall within the condemnation of the statute, its direct and immediate effect must be to restrain commerce among the states.

This construction of the Act being established, the power of Congress to regulate monopolies and contracts, combinations and conspiracies in restraint of trade was by no means thereby exhausted, and, as shown above, the Supreme Court has not so declared.

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[1] 171 U. S. 578.

[2] 171 U. S. 604.

In considering the power of Congress, several points must be remembered: First, no limitation of the power can be derived from the purpose for which it is exercised. As was said by Chief Justice Marshall, in Gibbons *v.* Ogden:[1]

> "Of course, there is no limit to the power to be derived from the purpose for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the motives which influence sovereign authority. It is enough that such power manifests its will."

Secondly, with the policy of legislation and with its wisdom the courts are not concerned. The question before the court is as to the existence of the power to enact the particular law. Mr. Justice Washington, in the case of the United States *v.* The Brigantine William,[2] in referring to the validity of an act of Congress under the commerce clause of the Constitution, said: "I say nothing of the policy of the expedient. It is not within my power." Thirdly, the existence of a clear and well-recognized distinction between legislative and legal discretion. The court should declare an act of the legislature void as being in excess of its power only in cases where its unconstitutionality is clearly demonstrable. Chancellor Kent, in the case of Livingston and Fulton *v.* Van Ingen,[3] said, referring to the validity of the legislative acts there under consideration:

> "In the first place, the presumption must be admitted to be extremely strong in favor of their validity. There is no very obvious constitutional objection, or it would not so repeatedly have escaped the notice of the several branches of the government, when these acts were under consideration. . . . It ought not to be any light or trivial difficulty that should induce us to set them aside. Unless the court should be able to vindicate itself by the soundest and most demonstrable argument, a decree prostrating all these laws would weaken, as I should apprehend, the authority and sanction of law in general, and impair, in some degree, the public confidence, either in the intelligence or integrity of the government."

The limit of the power of Congress over commerce has never yet been stated, and it never will be accurately. While its scope is always the same, yet the court must in each case declare that that case is either within the power or is not comprehended by it. The Supreme Court, in the Passenger Cases,[4] said:

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[1] 9 Wheat. (U. S.) 1.

[2] 2 Hall's Am. Law Journal 255.

[3] 9 John. Rep. 572.

[4] 7 How. 283 at p. 402.

"No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a state. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged."

Since the economic conditions and commercial transactions of the United States must, in view of its daily progress in the world of business, constantly change in extent and nature, it may very reasonably be supposed that, as the body of our commerce grows more complex, so will the necessity for the regulating power of Congress be more apparent; and therefore it is believed that the Supreme Court, governed by these considerations of necessity, will be more and more apt and ready to declare enactments of increasing breadth of application over affairs of commerce within the province and control of Congress.

"Commerce" is a very broad and comprehensive term, and in this age no word is more inclusive. Almost all the transactions of life are connected with it, if not directly, at least incidentally. Its welfare affects the progress of the nation and its civilization, and in a multitude of forms exercises a controlling influence over the daily life of its citizens and their happiness. That part of this broad subject, commerce, which is described as "commerce among the states," has been confided to Congress for regulation. It is now settled beyond question that as to transactions of distinctly interstate commerce the power of Congress is exclusive, and that legislation in regard thereto by the states contravenes the commerce clause of the Federal Constitution, and is void even in the absence of congressional legislation upon the particular subject. If the transaction is not within the exclusive power of Congress, it lies within the controlling power of the states in the exercise of their police powers. This control by the states is, however, subject to the power of Congress, in regulating commerce, to enact laws concerning the same subject-matter, and in order that the will of Congress when manifested may be supreme over the legislation of the several states, it is provided by clause 2, of article 6, of the Constitution of the United States, that the laws of the United States made in pursuance of the Constitution shall be the supreme law of the land.

It may be confidently affirmed that the power of Congress does not stop at the boundary line of a state, and that it may extend

into the states and operate directly upon matters and transactions carried on therein. The Supreme Court, in the case of United States *v.* Coombs,[1] said: "It does not stop at the mere boundary line of a state, nor is it confined to acts done on the water or in the necessary course of navigation."

Again, it is clear that the power may reach and apply to an agency, subject, or means, although it be entirely within the limits of the state. This was expressly determined by the decision in the case of The Daniel Ball.[2] In that case a steamer was employed in transporting goods on the Grand River, within the limits of the State of Michigan, some of the goods being destined for other states and some being brought from without the limits of Michigan and destined to points within that state. The court held that the steamer was engaged in commerce between the states, and however limited that commerce was, so far as it went it was subject to the legislation of Congress. The court said:

> "It is said that if the position here assumed be sustained, there is no such thing as the domestic trade of a state; that Congress may take the entire control of the commerce of the country and extend its regulations to the railroads within a state on which grain or fruit is transported to a distant market. . . . And we answer . . . that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a state, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

If Congress were prevented from acting upon subjects merely because they are wholly within the territorial limits of a state, even though their regulation be deemed necessary, in order to properly govern commerce among the states, the power of Congress would be subverted and hampered. If the Constitution were so construed, the result in many cases would be that, by the very clause conferring the power, the exercise of that power would be so fettered as to render the clause, instead of a grant of power, a provision that such power shall not be exercised.

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[1] 12 Peters 72.

[2] 10 Wall. 577.

Finally, it is believed that Congress has power of regulation over any transaction, cause, or thing whatsoever within the limits of these United States, including the internal commerce of a state which may be reasonably regarded by it as deleterious to interstate commerce. The power is given to regulate. Regulation means government. Government implies action in a manner that controls. To control, one must possess the power to control and the means to enforce that power. The power conferred is governmental. It imports as necessary to its efficacy the right to direct the entire matter to which the power relates. Power to control a given subject includes by necessary implication the right by legislation to promote and restrict it and to destroy or regulate any factors or causes which may disturb or injuriously affect it. The court, in Gibbons *v.* Ogden,[1] in answer to the question, "What is this power?" said:

> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

Congress, though restricted to the regulation of commerce among the states, is not precluded, in so regulating that commerce, from enacting laws concerning other subject-matters than what may be termed transactions distinctively of interstate commerce, and the acts, means, mediums, and subjects of that commerce. Regulation "*ex vi termini* implies harmony and uniformity of action." How can Congress regulate interstate commerce, if it has not the power of control over such matters as it may consider incidentally affect it? The commerce of this country may be considered as a very complex unit. Disease in the smallest nerve in the body of commerce may affect the health of the entire body or the health of any other portion of the body. Evils in the internal commerce of a state may disturb the welfare of the entire body of commerce, including that between the states. There cannot, in

[1] 9 Wheat. (U. S.) 1, 196.

commerce among the states, be harmony and uniformity if Congress is without the power to remedy any evil which may affect it.

That Congress may legislate concerning the internal commerce of a state, when reasonably necessary to enable it to exercise its power of regulation or control, is affirmed by that ablest and most far-sighted of all the expounders of our Constitution, Chief Justice Marshall. In Gibbons *v.* Ogden he said:

"It is obvious that the government of the Union, in the exercise of its express powers, — that, for example, of regulating commerce with foreign nations and among the states, — may use means that may also be employed by a state in the exercise of its acknowledged powers; that, for example, of regulating commerce within the state. . . . All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinguished to establish their individuality."

It is thus recognized that, while the states are entitled to legislate, in the exercise of their police power, concerning their internal affairs, yet Congress may, in the exercise of its acknowledged powers, legislate concerning the same subject matter, and perhaps use the same means to accomplish its object that might be invoked by the legislature of the state.

In the same case the Chief Justice said, in defining the powers of Congress, that it had no power to act upon those internal concerns "which do not affect other states and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." By this statement it is affirmed by strong negative implication that Congress has power over such internal concerns when they do affect other states, and also over those with which it is necessary to interfere for the purpose of executing some of the general powers of the government. The extent to which these concerns shall affect other states is not stated, but the construction of the word "necessary" must not be a narrow one. As has been shown above, the court must not declare that an enactment of Congress is void because the subject aimed at does not affect other states, unless it could on no reasonable theory be so considered. The same rule is applicable in determining whether it is necessary to interfere with a given subject in order to execute some general power of gov-

ernment. The word "necessary" does not purport absolute necessity, but what Congress might rationally deem reasonable necessity. This construction is further supported by the statement of the court in the case of United States *v.* Coombs.[1] The Supreme Court there said that any offense which

"interferes with, obstructs or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."

Any evil, even though it be one purely within the confines of a state, which affects commerce among the states, which retards or injures or in any manner burdens that commerce, falls within the power of Congress. It cannot be said that Congress, having in view the welfare of its people individually and as a whole, is so impotent as not to be able to prevent, restrain, or regulate transactions which only indirectly affect and injure commerce and trade among the states. There can be regulation of nothing by anybody, individual or government, in the absence of power to destroy, if need be, anything which conflicts with the harmony and government of that thing.

The power of Congress under the commerce clause of the Federal Constitution, in dealing with contracts, combinations, and conspiracies in restraint of trade among the states, is not limited to regulations of direct restraints of trade and commerce among the states, but also extends to any indirect restraints, no matter to what extent removed, which might reasonably be considered by Congress to affect that commerce. And the question is not as to the policy of the expedient adopted. The sole question for the court is the dry one: Can this affect commerce among the states? A few instances illustrating the consequences of holding that such power is not possessed by Congress will bring into sharper relief the necessity for its existence in Congress and render the conclusion more easy that it is not lacking under the Constitution.

Take a corporation resident in New York, controlling the manufacture in that state of a certain product, not shipping its product outside the state nor desiring so to do, but by its efforts first stifling the small dealer and then raising prices over the large area of that state. Such a course of dealing may, with much reason, be considered as injuriously affecting commerce among the states.

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[1] 12 Peters 72.

It is clear that the legislature of a given state cannot grant a monopoly of trade so as to prevent by positive law competition through interstate shipments by those outside the state with the monopoly within the state. Such a grant would seriously affect commerce among the states. In Brimmer *v.* Rebman, Mr. Justice Harlan said:[1]

> "Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the rights under the constitution to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere . . . Any local regulation which in terms or by its necessary operation denies this equality in the markets of a state is, when applied to the people and products and industries of other states, a direct burden upon commerce among the States, and, therefore, void."[2]

If this result cannot be reached by the sanction of the prohibitive law of a state, on the ground that it would be a regulation of interstate commerce not within the power of the state, it follows as being by no means an unreasonable proposition that the establishment of a virtual monopoly may in some large degree, even if not to the same extent as a legal monopoly, affect and injure commerce among the states. Its effect upon the small dealer and upon competition with the monopoly would not be confined to those individuals and corporations within the territorial limits of the particular state, but would extend beyond its boundaries and discourage interstate shipments of the commodity in question. In like manner, interstate shipments by those within the state who had been "squeezed out" by the monopoly would, by reason of the destruction of their business, be cut off and put to an end.

Again, were Congress without such power, every state would have the power and each might well establish regulations which might be regarded by them as best suited to obviate the particular

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[1] 138 U. S. 78.

[2] See also Bowman *v.* Chicago & N. W. Ry. Co., 125 U. S. 465.

evil. Such regulations they would undoubtedly put into effect, even though their modes of reaching the desired result might be entirely different from the mode that Congress might choose, having in view the whole country and the deleterious effect which the evil might occasion not only the commerce within a particular state, but commerce among the states. In short, uniformity of regulation might, with wisdom, be thought necessary, even though the matter affected commerce among the states only indirectly and in a remote degree.

It has been held by the Supreme Court of the United States, in the decision of United States *v.* E. C. Knight Co., referred to above, that a monopoly of manufacture is not one of commerce, and that since such a monopoly only indirectly restrains commerce among the states it does not fall within the Sherman Anti-Trust Act. In regard to the regulation of such a monopoly of manufacture, it cannot be doubted that the power of Congress extends further than does that act. The natural tendency of a monopoly of manufacture is towards a monopoly of sale. The line between the two forms of monopoly is not one of substance, but rather one of definition, and if it is seen that the almost inevitable tendency of the one is to result in the other, it must lie in the power of Congress, in its wisdom and discretion, to declare that which is found in practice to produce a certain result, which result is contrary to the public policy of the nation, also contrary to that policy, and declare the cause illegal.

A doubt has been expressed above as to the decision of the Circuit Court of Appeals in the case of the United States *v.* The Northern Securities Co. Whether or not the Securities Company did fall within the provisions of the Sherman Anti-Trust Act, it is believed that there can be no reasonable doubt that Congress, under its power to regulate commerce among the states, can enact a law to prevent such a merger as was attempted in that case. It needs no argument to demonstrate that the combination in the Securities case might, and probably would, have been so conducted as to restrain commerce among the several states and destroy competition between the competing lines of railway. The point arises, whether an act of Congress aimed at the regulation or prevention of such a combination would operate as a deprivation of liberty or property without due process of law, within the meaning of the Fifth Amendment to the Constitution of the United States. In the case of the United States *v.* Addystone

Pipe & Steel Co.[1] it was held that this constitutional provision is subject to the right of Congress to regulate direct restraints of trade and commerce among the states. It was in that case determined that the restraint there under consideration was a direct restraint, and it was therefore held that the act, as applied to the combination there assailed, did not operate as a deprivation of liberty or property without due process of law. The question whether the act, as applied to combinations not in direct but only indirect restraint of trade, would so operate was not necessarily involved or decided. It has been held that the anti-trust statutes enacted by several of the states of the Union do not operate as such a deprivation of liberty or property. In the case of The State *v.* The Fireman's Fund Insurance Co.[2] the constitutional validity of the anti-trust statute of the State of Missouri was brought into question. That statute provided that "any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state . . . which shall enter into . . . any pool, trust, agreement, confederation or understanding with any other corporation, . . . person or association of persons to regulate or fix . . . the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price," should be subject to a penalty. The court held that this statute did not constitute a deprivation of liberty or property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. The court said:[3]

"There is no more merit in this contention than there would be that a law was unconstitutional which prohibited two or more persons from conspiring to commit murder or burglary, or any other felony. There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government to legislate is complete; so that, while according to every man the fullest liberty to do what he pleases with his own, he must not interfere with the same rights of others. This principle underlies and runs through all governments and societies. . . ."

The same principle was affirmed in Walters-Pierce Oil Co. *v.* The State of Texas,[4] where the validity of the Texas anti-trust

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[1] 175 U. S. 211.

[2] 152 Mo. 1.

[3] P. 47.

[4] 19 Tex. Civ. App. 1.

statute under the Fourteenth Amendment was under consideration. The court said that the regulation of combinations fell within the power of the state to legislate for the welfare of its people, and added:

"This is one of the inherent rights of sovereignty, and it is as much in place that it should be exercised where the public interest requires as it is the duty of the state, by stringent laws, to protect society from the depredations of a thief or the ravages of a murderer. . . . By adequate laws looking to the suppression of evil, the state . . . must necessarily restrain the unbridled license of the citizen in his conduct and use of property, and restraints imposed in this way have never been held to illegally impair his liberty. . . . The freedom of speech, the liberty of person and life itself must be surrendered where the public interests and the order of good government so require. The liberty of the citizen, which embraces the legal right to his property and to lawfully contract concerning it, stands on no higher ground."[1]

If Congress has power to legislate concerning combinations which only incidentally affect interstate commerce and over which the states have power of regulation, in the absence of regulation by Congress, and if, as has been decided, the states are not prohibited from so legislating, on the ground that such legislation would operate as a deprivation of liberty or property without due process of law, then manifestly such an act by Congress would not be void for that reason; for such an act would not be invalid to any greater extent, under the constitutional provision denying to Congress the right to so legislate as to deprive any person of liberty or property without due process of law, than it would be under the Fourteenth Amendment to the Constitution, which declares that no state shall so legislate as to so deprive any person of liberty or property. If Congress, in the exercise of its legislative discretion, should deem it proper to prohibit for the welfare of commerce among the states such a combination of interests as was attempted in the Northern Securities merger, it cannot be reasonably contended that the rights of individuals or corporations in the acquisition of property and in the making of contracts should not be subject to the higher rights of the public.

Numerous other instances which space does not allow might be cited to sustain the contention made above as to the extent of the power of Congress under the commerce clause of the Constitution.

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[1] See also The State *v.* The Buckeye Pipe Line Co., 61 Oh. St. 520.

As incident to this power of regulation, it is believed that Congress may call to its aid any means that may enable it to act intelligently with a due regard for the rights of the individual and the public and within its constitutional power. One great aid towards this result will be the requirement of publicity in regard to the dealings of individuals and corporations engaged in the carrying on of transactions which may be reasonably considered to be deleterious to the interests of commerce or which may be reasonably regarded as affecting it.

In defining the cause which affects commerce among the states, and which is for that reason subject to the regulating power of Congress, we cannot say that only direct causes are included and that indirect causes are excluded. We cannot proceed, as do the courts in defining liability for a tort, and declare that only the direct cause will be regarded and that the remote will be disregarded. We cannot assert that the *sine qua non* has no place in our calculations, on the ground that if the cause is nothing more it cannot be considered, and that we require the proximate cause. This we cannot do, because we are dealing with a sovereign power, plenary in its character. That the members of the legislative body may not in some cases have such wisdom and foresight as their constituents wish, is no argument against the existence of this sovereign power. Wisdom must be imputed to the legislative body. The fact that a particular agreement or transaction may only in the most remote sense affect interstate commerce will not be sufficient to enable the court to declare it beyond the power of Congress. All matters which might govern the deliberations of Congress in the enactment of a particular law must be weighed: if not the present effect of the evil sought to be eradicated, then its possible future effect, if allowed to proceed undisturbed; if only a small matter now, its possible greatness in the future. If commerce among the states be affected only incidentally by a particular matter, and if that matter could never become one which would affect it to a greater degree, then it must be considered how many matters of an exactly similar nature exist and the evil which would result from all of them combined, had Congress not the power to control and regulate them. Great latitude must be accorded the legislative body, and it must be remembered that the question before the court is one of the validity of an act of a large and intelligent body of men who are governed, as is the court, by considerations as to the extent of their constitutional

power to legislate, not under a narrow, restricted power of attorney, but under a governmental power vested in them by a constitution creating a sovereignty.

It is not intended by what has here been written to advocate the full exercise of this power of Congress, or to assert that it would be a wise policy which would lead to that result. An attempt has been made merely to define the extent of the power.

Augustine L. Humes.

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